Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-237

ORDER ON RECONSIDERATION

Adopted: April 17, 2000 **Released:** April 27, 2000

Before the Commission:

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I. INTRODUCTION

1. In this Order, we consider petitions for reconsideration of various aspects of our Report and Order implementing section 259 of the Act.[1] We affirm our decision to implement section 259 through a negotiation-driven approach that relies on parties to reach mutually-satisfactory terms for infrastructure sharing. We grant, in part, a petition from Southwestern Bell (SWBT) by making clear that section 259 cannot be used to resell the incumbent LEC's service within the incumbent LEC's telephone exchange area. We also grant, to the extent described herein, petitions of BellSouth, GTE, Octel, and SWBT concerning intellectual property rights by modifying our requirement that incumbent LECs be made responsible for obtaining licensing for the benefit of qualifying carriers. We further grant SWBT's petition for clarification that under section 259 incumbent LECs need not make available the intellectual property of third parties where appropriate licensing has not been obtained.[2] Finally, we deny a request from MCI that we exercise pricing authority to ensure that section 259 arrangements are priced based on forward-looking costs. Our decisions here will reduce uncertainty over the scope and obligations under section 259, promoting the use of innovative agreements to bring more and higher quality services to the customers of smaller telephone companies at lower prices.

II. BACKGROUND

A. Section 259

2. In the Telecommunications Act of 1996, Congress moved to restructure the local telecommunications market by removing legal, regulatory, and economic impediments to

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[1] *In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 5470 (rel. Feb. 7, 1997) ("*Infrastructure Sharing Order*").

[2] In this Order on Reconsideration we determine that section 259 imposes on incumbent LECs certain obligations that implicate the intellectual property rights of third parties. Concurrently today, by a Memorandum Opinion and Order in CC Docket No. 96-98, we determine that different obligations affecting third party intellectual property rights are imposed on incumbent LECs by section 251 (c)(3). *See Petition of MCI for Declaratory Ruling*, FCC 00-139, CC Docket No. 96-98, CCB Pol 97-4 (rel. April 27, 2000) ("*MCI Order*"). This dissimilar treatment is mandated by the different requirements and operational contexts of the two statutory provisions. Section 251 governs interconnection and unbundled access requests, *inter alia*, on a non-discriminatory basis. *See* 47 U.S.C. §§ 251(c)(2)(D), (c)(3). Construing this non-discrimination requirement in the *MCI Order*, we find that incumbent LECs must exercise "best efforts" to obtain co-extensive rights on behalf of competing LECs obtaining unbundled access pursuant section 251 where such access implicates third party intellectual property rights. *MCI Order* at ¶9. Section 259, to the contrary, applies only where *non-competing* carriers share access to an incumbent LECs "public switched network infrastructure, technology, information, and telecommunications facilities and functions." 47 U.S.C. § 259(a). As the Commission recognized in the *Infrastructure Sharing Order*, incumbent LECs in section 259 cases have less incentive to deny non-competing carriers the full benefit of infrastructure sharing agreements than they would competing carrier interconnection requests made pursuant to section 251. *See Infrastructure Sharing Order*, 12 FCC Rcd at 5528, 5530-31, ¶116. Also in contrast to section 251, section 259 contains no explicit non-discrimination requirement. Given these differences, we see no compelling reason to impose upon incumbent LECs in section 259 sharing cases the same "best efforts" requirement that we find is necessary in the very different context of section 251.

competition that sustain a monopoly environment.[3] As part of this restructuring, Congress adopted section 259, which requires incumbent LECs to make available, under certain conditions, public switched network infrastructure and other capabilities to qualifying carriers that are providing telephone exchange service outside the incumbent LEC's area. On February 7, 1997, the Commission promulgated general rules and guidelines to define the obligations imposed by section 259. Recognizing that a qualifying carrier may not use the facilities or functions of the incumbent LEC to compete in the incumbent's telephone exchange area, as is the case in other market opening provisions of the Telecommunications Act of 1996 such as sections 251 and 252, the *Infrastructure Sharing Order* adopted an approach that depends in large part on negotiations among the interested parties.[4]

B. Petitions

3. Five parties seek reconsideration or clarification of the *Infrastructure Sharing Order*.[5] SWBT requests that the Commission reconsider its decision that qualifying carriers may resell an incumbent LEC's telecommunications services under section 259, asserting that the absence of the phrase "telecommunications services" from the list in section 259(a) indicates a Congressional intent to exclude resale of services from section 259.[6] Additionally, four parties filed petitions concerning the Commission's intellectual property licensing rules adopted in the *Infrastructure Sharing Order*, which are addressed in detail below.[7] Finally, MCI asks that the Commission reconsider its decision to abstain from exercising pricing authority.[8]

III. ISSUES ON RECONSIDERATION

A. Resale

4. In the *Infrastructure Sharing Order*, the Commission declined to adopt specific definitions of the "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that incumbent LECs must make available to qualifying carriers pursuant to section 259(a). Seeking to furnish parties with adequate flexibility both now and in the future, *i.e.*, as technology continues to evolve, the Commission reasoned that "it is essential to ensure that the statutory purpose behind section 259 -- to provide qualifying carriers with specific opportunities to obtain infrastructure -- is not defeated by definitions that are restrictively based on perceptions of present network requirements."[9] Consistent with this

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

[4] *Infrastructure Sharing Order*, 12 FCC Rcd at 5476, ¶ 8.

[5] *See* Appendix A.

[6] SWBT Petition at 7.

[7] SWBT, BellSouth, GTE, and Octel.

[8] MCI Petition at 1, 4-5.

[9] *Infrastructure Sharing Order*, 12 FCC Rcd at 5496, ¶ 51.

approach, the Commission found no reason to exclude, *per se*, any facilities, functions, or information from the negotiations and agreements under section 259. The Commission noted that there could be an overlap between those "telecommunications facilities and functions" that are the subject of section 259(a), and interconnection, unbundled network facilities, and resale made available pursuant to section 251(b) and (c).[10] The Commission concluded that qualifying carriers should be able to obtain section 251-available network facilities and functionalities, including lease arrangements and resale of services, pursuant to section 251 and/or section 259 -- except to the extent precluded by section 259(b)(6).[11] SWBT requests that the Commission reconsider its decision in the *Infrastructure Sharing Order* and exclude "resale" and "services" from the scope of section 259(a).[12] We grant, in part, SWBT's petition and make clear that section 259 may not be used to resell services to customers within the incumbent LEC's telephone exchange area. We deny, in part, SWBT's petition because we decline to exclude "services" from the scope of section 259(a).

5. In the *Infrastructure Sharing Order*, we concluded that the explicit language of section 259(b)(6) prevents qualifying carriers from using section 259-requested infrastructure to compete with the providing LEC in its telephone exchange area.[13] Thus, "resale" arrangements like those contemplated under section 251,[14] where the qualifying carrier uses the facilities to compete with the providing carrier in its telephone exchange area, simply are not permitted under section 259 arrangements. Therefore, to the extent that such agreements would run contra to the explicit language of section 259, we clarify that they are outside the scope of that section.

6. We disagree, however, with SWBT's further argument that incumbent LECs are not obligated to make available to qualifying carriers anything that might be characterized as a "service." To the contrary, we reiterate our belief that qualifying carriers should not be denied the benefits of section 259 sharing simply because some otherwise valid requests for functionalities might be characterized as "service" requests, or because the service derived from a section 259 sharing request might be offered to the *qualifying carrier's* customers (*i.e.*, to

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[10] 47 U.S.C. § 251(b), (c). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. CompTel. v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, 120 F.3d 753 (8th. Cir., Jul. 18, 1997), *aff'd in part and remanded, AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12453 (1997), *further recons. pending*.

[11] *Infrastructure Sharing Order*, 12 FCC Rcd at 5497, ¶ 54.

[12] SWBT Petition at 7. No parties addressed this issue in oppositions or reply comments.

[13] 47 U.S.C. § 259(b)(6) (stating that the Commission shall "not require a [providing local exchange carrier] to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area").

[14] 47 U.S.C. § 251(b)(1), (c)(4).

customers not within the incumbent LEC's telephone exchange area). Specifically, we are not persuaded by SWBT's argument that the omission of the phrase "telecommunications services" from the list in 259(a) indicates a Congressional intent to exclude services from section 259.[15] Indeed, we note that other portions of section 259 indicate a Congressional understanding that an incumbent LEC might meet its section 259 obligations by offering a service to the qualifying carrier.[16] These uses of the word "services" to describe the subject matter of section 259 agreements lead us to believe that Congress did not intend to exclude, *per se*, services from the scope of section 259. We, thus, reaffirm our earlier finding that our rules implementing section 259(a) should not rely on "definitions that are restrictively based on perceptions of present network requirements."[17]

7. Nor are we persuaded by SWBT's argument that our decision to include services in the scope of section 259 sharing would violate the wholesale pricing standard of section 252(d)(3) and would unlawfully intrude upon the jurisdiction of the state commissions.[18] Section 252(d)(3), pursuant to its express language, applies only to resale of services provided pursuant to section 251(c)(4). Quite apart from that section, section 259(a) grants the Commission authority to promulgate rules concerning any section 259 agreement. Therefore, section 252(d)(3) simply is not implicated.[19] Thus, pricing for section 259 sharing agreements must comply with the rules and policies adopted in the *Infrastructure Sharing Order*, not section 252(d)(3).

B. Intellectual Property and Licensing Issues

8. In the *Infrastructure Sharing Order*, the Commission contemplated that incumbent LECs might receive from qualifying carriers section 259 sharing requests that implicate the intellectual property or licensing interests of third parties.[20] The Commission nevertheless expressed the expectation that, in many if not most cases, incumbent LECs and qualifying carriers would be able to negotiate section 259 arrangements without directly implicating those third-party rights. Where such negotiations failed because third-party rights could not be accommodated, the Commission concluded that incumbent LECs must take affirmative steps to

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[15] SWBT Petition at 7 (commenting that the "use of multiple descriptive words to list what is eligible for sharing indicates the exclusion of all others . . .").

[16] For example, subsection 259(b) prohibits the Commission from requiring "the joint ownership or operation of public switched network infrastructure and *services* by or among" an incumbent LEC and a qualifying carrier. Similarly, section 259(c) requires incumbent LECs to provide timely information about "the planned deployment of telecommunications *services* and equipment . . . ." 47 U.S.C. § 259(b), (c) (emphasis added).

[17] *Infrastructure Sharing Order*, 12 FCC Rcd at 5496, ¶ 51.

[18] SWBT Petition at 8.

[19] 47 U.S.C. § 252(d)(3) ("For the purposes of section 251(c)(4) . . . ").

[20] *See Infrastructure Sharing Order*, 12 FCC Rcd at 5504-05, ¶¶ 68-70. *See also* BellSouth Reply Comments at 2 ("petitioners make no claim that licensed infrastructure is excluded from the sharing mandate . . .").

ensure that otherwise valid qualifying carrier requests were not frustrated.[21] Four petitioners seek reconsideration of the Commission's decision with respect to certain intellectual property and licensing rights.[22]

9. We grant petitioners' requests and modify the requirements that we impose on incumbent LECs to accommodate qualifying carrier sharing requests. First, we accept SWBT's suggestion and make clear that nothing in our rules would require an incumbent LEC to make available the intellectual property of third parties without necessary licensing or in violation of existing licensing agreements.[23] Second, we modify the *Infrastructure Sharing Order* by placing the primary burden to obtain third-party intellectual property and licensing rights on qualifying carriers. We, however, retain the requirement that incumbent LECs shall engage in good faith efforts, whenever requested, to help resolve intellectual property and licensing disputes between qualifying carriers and third parties. In so modifying our original order, we continue to interpret section 259 in a manner that facilitates the provision of telecommunications services by qualifying carriers that lack economies of scale and scope, while limiting the burdens placed on incumbent LECs and preserving the rights of third parties.

10. As we have consistently stated, one benefit of section 259's negotiation-driven approach to infrastructure sharing is that parties can exercise great flexibility in fashioning specific section 259 agreements.[24] As we concluded in the *Infrastructure Sharing Order* and reiterate here, our expectation is that, in many cases, incumbent LECs will be able to satisfy their section 259 sharing requests without directly implicating the intellectual property and licensing rights of third parties.[25] We have been presented with no fact that causes us to alter this expectation. Nevertheless, as the Commission recognized in the *Infrastructure Sharing Order*, there may be circumstances where parties cannot negotiate section 259 agreements without directly implicating third-party intellectual property rights.[26] Where such circumstances arise, we fully expect that third-party vendors whose intellectual property or licensing rights are at issue in such cases will be included in associated negotiations. In every case, we reiterate our

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[21] *Id.*, 12 FCC Rcd at 5505, ¶ 70 ("where the only means available is including the qualifying carrier in a licensing arrangement, the incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." If the incumbent LEC cannot secure such a licensing agreement, it must do "what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259").

[22] BellSouth Petition at 1; GTE Petition at 1; Octel Petition at 1; SWBT Petition at 1.

[23] SWBT Petition at 9.

[24] We, nonetheless, noted that the language of section 259 placed specific limitations on a qualifying carrier's use of section 259-shared infrastructure. *See Infrastructure Sharing Order*, 12 FCC Rcd at 5495, 5497-98, ¶¶ 50, 55.

[25] *See Infrastructure Sharing Order*, 12 FCC Rcd at 5504-05, ¶ 69 (citing comments of AT&T and Sprint).

[26] We need not identify such cases in advance as they will turn on a host of considerations peculiar to the terms of specific agreements, including: the scope of the use restrictions placed on the intellectual property by the vendor; the nature of the access and use contemplated by the qualifying carrier; the nature of the intellectual property included in the request; and the applicable intellectual property or contract law.

determination that the implementation of section 259, and the negotiation of section 259 agreements, must preserve vendors' rights in their intellectual property and thus, we do not require an incumbent LEC to violate or void third-party agreements merely because it has received a valid request for infrastructure sharing from a qualifying carrier.[27]

11. We remain optimistic that, in the ordinary course, parties negotiating section 259 agreements can readily accommodate third-party concerns, *i.e.*, through direct negotiations with third parties. Because section 259 does not allow the qualifying carrier to use the facilities and functionalities it receives under a 259 arrangement to compete against the providing LEC, *all* parties -- incumbent LECs, qualifying carriers, and third parties -- have the appropriate economic incentives to achieve mutually beneficial agreements.[28] Based on these observations, we find persuasive BellSouth's contention that there is no reason to expect that qualifying carriers and incumbent LECs cannot work with third parties to achieve necessary licensing arrangements, given the unique level of cooperation contemplated by section 259. We conclude, therefore, that to the extent that such licensing is necessary, qualifying carriers, not incumbent LECs, have the primary and ultimate obligation to obtain such agreements from third parties.

12. Nevertheless, we retain our requirement that incumbent LECs must exercise good faith efforts to facilitate negotiations between qualifying carriers and third parties. While section 259 does not specifically address those situations where the infrastructure requested by a qualifying carrier is subject to the intellectual property or licensing rights of third parties, such a requirement is consistent with the language of section 259(a), which grants rights to qualifying carriers and places an affirmative obligation on incumbent LECs. Without access to infrastructure components that are subject to third-party rights, otherwise valid section 259 requests could be effectively nullified. Because the incumbent LEC has information that is essential in determining whether third-party intellectual property rights are implicated and in developing resolutions that accommodate the needs of all three parties, we believe that, in every case, an incumbent LEC should provide timely information that identifies third-party intellectual property and licensing rights that might be implicated by a qualifying carrier's request for section 259 sharing.[29] At a minimum, such information should detail the name of specific third-party vendors, the subject intellectual property, and the relevant contracts which govern the incumbent

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[27] SWBT Petition at 9. *See also Infrastructure Sharing Order*, 12 FCC Rcd at 5505, ¶ 70 ("We emphasize that our decision is not directed at third party providers of information but at incumbent LECs.").

[28] *Id.*, 12 FCC Rcd at 5528, 5530-31, ¶ 116 (concluding that any unequal bargaining power between qualifying carriers -- including new entrants -- and incumbent LECs "is less relevant than it is in the more general competitive situation (*i.e.*, between competing carriers) since the [providing] incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage"), ¶ 121. *See also* GTE Reply at 3-4 (noting the "statements of numerous vendors that they are ready and willing to work with any parties seeking licenses of their intellectual property").

[29] *See, e.g.*, SWBT Petition at 6-7 ("Subject to any non-disclosure obligations to [intellectual property (IP)] holders, incumbent LECs are in the best position to identify what IP would be implicated by an infrastructure sharing request, and to help clarify whether and how the existing license permits the IP to be shared."); USTA Comments at 5 ("The [incumbent LEC] should be required to work with the [qualifying carrier] to identify in a timely manner those parts of the infrastructure to be shared that require separate licensing arrangements.").

LEC's use of that intellectual property.[30] Further, because incumbent LECs can bring to negotiations over intellectual property disputes a knowledge of their own networks and facilities, [31] where a qualifying carrier seeks the participation of the incumbent LEC in negotiations with third-party vendors, the incumbent LEC is obliged to participate in such negotiations and to assist in developing solutions that promote the goals of section 259.[32] Finally, where parties' efforts to obtain necessary intellectual property or licensing rights fail or where qualifying carriers believe that incumbent LECs have not exercised good faith efforts to assist in the resolution of intellectual property disputes, parties have the opportunity to seek resolution of their dispute before this Commission.[33]

13. The modifications to our *Infrastructure Sharing Order* that we adopt today are consistent with the Congressional directive in section 259(b)(5) to establish conditions for sharing agreements that promote cooperation between incumbent LECs and qualifying carriers.[34] Moreover, they are consistent with our understanding of the limits on incumbent LEC obligations enumerated in sections 259(b)(1) and (2).[35] We do not believe it necessary at this time to further specify what efforts would satisfy or exceed the standard set out in section 259, as such determinations will be fact specific and must be resolved on a case-by-case basis.

14. In modifying our original order, we also address the issues of privity of contract raised by Octel and SWBT.[36] Octel, an equipment vendor, argues that there should be a direct

[30] It is our understanding that many contracts between incumbent LECs and third-party vendors may be subject to non-disclosure provisions. We leave to the parties to negotiate a reasonable means of conveying this information in a manner that does not violate the terms of any confidentiality agreement. We expect, however, that in many cases a redacted version of the contract could be made available to the qualifying carrier in order to assist the carrier in determining permissible uses of the infrastructure at issue.

[31] *See* RTC Reply at 5-6 (arguing that incumbent LECs will be able to negotiate better arrangements with third parties based on their existing relationships with any third-party vendors and based on their relative size); *contra* GTE Reply at 2; BellSouth Reply at 2; SWBT Reply at 2-5 ("[T]he RTC Reply . . . seems to suggest that a sharing incumbent LEC's purchasing and negotiating abilities are economies of [scale] and scope that should be made available to qualifying carriers. There is no basis in the Act or Section 259 for such a conclusion.").

[32] We note that both incumbent LECs and qualifying carriers generally are subject to a duty to negotiate in good faith. *See Infrastructure Sharing Order*, 12 FCC Rcd at 5531, ¶ 122. We also note that the Commission's interpretation of section 259(b)(1) allows incumbent LECs to recover their costs associated with section 259 sharing and we see no reason why incumbent LECs should not be able to recover their costs associated with any additional third-party licensing that is reasonable and necessary. *See id.*, ¶¶ 95-98.

[33] *Id.*, 12 FCC Rcd at 5511, ¶ 81 (concerning resolution of disputes).

[34] 47 U.S.C. §§ 259(b)(5).

[35] 47 U.S.C. §§ 259(b)(1),(2). We also note that our decision on reconsideration appears to be consistent with the comments of RTC, a representative of potential qualifying carriers. RTC maintains that the Commission in the *Infrastructure Sharing Order* merely required incumbent LECs to approach third-party vendors and to engage in a "reasonable level of cooperation." RTC Reply at 5.

[36] *See* SWBT Petition at 5; Octel Petition at 2; USTA Opposition at 5.

legal relationship between third-party vendors and qualifying carriers in order to establish privity of contract.[37] Under our requirements, as modified in this Order, where it is necessary to establish a direct contract between the qualifying carrier and the third party, such privity can be negotiated.[38]

15. Finally, we note that by Memorandum Opinion and Order the Commission is concurrently adopting different standards relating to intellectual property issues in the context of implementing section 251.[39] Given the different context in which section 259 operates and the difference in statutory language, we think it important to state clearly that our decision on reconsideration here is made without effect on the disposition of intellectual property issues raised by parties in section 251 proceedings.[40]

C. Pricing Issues

16. In the *Infrastructure Sharing Order*, the Commission found nothing in either the express statutory language of section 259 or its legislative history that evidenced a congressional intent to impose any particular price outcome pursuant to this requirement.[41] While the Commission found that the "fully benefit" language of section 259(b)(4) may implicate pricing concerns, the Commission reserved the specific question of pricing authority.[42] The Commission concluded that the section 259 negotiation process, along with the availability of the Commission's dispute resolution, arbitration, and complaint processes, will ensure that qualifying carriers fully benefit from the economies of scale and scope of incumbent LECs. MCI requests that the Commission reconsider its decision not to assert pricing authority with respect to infrastructure sharing arrangements.[43] Essentially, MCI argues that Congress' intent in section 259 was that qualifying carriers, alone, should receive the benefits of the incumbent LECs' economies of scale and scope in the context of infrastructure sharing arrangements and that this result can only be realized if the Commission ensures that prices for shared infrastructure are based solely on forward-looking costs.[44] Thus, MCI concludes that the Commission's

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[37] Octel Petition at 2. *See also* BellSouth Petition at 7; SWBT Petition at 5.

[38] We reiterate our belief that, in many circumstances, an incumbent LEC may simply be able to extend its existing agreement with a third-party vendor in a way that would allow the incumbent LEC to provide additional services or functionalities to the qualifying carrier.

[39] *See MCI Order*, FCC 00-139, CC Docket No. 96-98, CCB Pol 97-4 (rel. April 27, 2000).

[40] *See supra* n.1.

[41] *Infrastructure Sharing Order*, 12 FCC Rcd at 5500, ¶ 60. *See also* 47 U.S.C. § 259(b)(4).

[42] *Id.*, 12 FCC Rcd at 5528, ¶¶ 115-116.

[43] MCI Petition at 2. Four parties filed oppositions to MCI's petition regarding the pricing of infrastructure sharing arrangements. BellSouth Opposition; GTE Opposition; RTC Reply Comments; USTA Opposition and Comments.

[44] *Id.* at 4-5 (specifically arguing that section 259 requires incumbent LECs to share infrastructure at prices that are no higher than average incremental cost, exclusive of joint and common costs). MCI also argues that the Commission (continued....)

negotiation-driven approach directly contravenes the intent of Congress, as evinced by inclusion of the phrase "fully benefit" in section 259(b)(4).[45] Four parties filed oppositions to MCI's petition and all disagree with MCI's argument that qualifying carriers will fully benefit from the economies of scale and scope of incumbent LECs only if the price of shared infrastructure is required to be exclusive of all joint and common costs.[46]

17. We conclude that MCI has failed to show why the Commission should reconsider its decision in the *Infrastructure Sharing Order* to refrain from asserting pricing authority to mandate particular prices for shared infrastructure obtained by qualifying carriers pursuant to section 259.[47] MCI's petition largely restates arguments it made in comments and reply comments submitted in the proceeding below. The Commission rejected MCI's analysis in its consideration of the *Infrastructure Sharing Order* and MCI has not brought any new information or arguments to our attention to persuade us to revisit our decision not to assert pricing authority to achieve such an outcome in the context of implementing section 259 infrastructure sharing rules.

18. In its petition, MCI ignores the reasons why the Commission decided that party negotiations would best effectuate the statutory purpose. As the Commission determined in the *Infrastructure Sharing Order,* section 259 requires that a qualifying carrier not use infrastructure obtained pursuant to a section 259 agreement to compete with the incumbent LEC.[48] Considering this determination and the section 259(b)(1) requirement that the incumbent LEC be allowed to recover its costs associated with providing infrastructure, the Commission stated its expectation that, in the ordinary course, incumbent LECs should lack the incentive to deny

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should require incumbent LECs to file incremental cost studies, utilizing the methodology of the *Local Competition First Report and Order*, and set prices for shared infrastructure equal to these costs. MCI Petition at 6 (citing *Local Competition Order*, 11 FCC Rcd at 15844-45, ¶ 675).

[45] *Id.* at 3 (asserting that by the "fully benefit" phrase Congress intended that an incumbent LEC "should *not* benefit from economies of scale and scope" in its relation with a qualifying carrier (emphasis in original)).

[46] BellSouth Opposition at 6 (a qualifying carrier "may benefit from the just and reasonable terms of a negotiated agreement without being the *sole* beneficiary of the agreement. . . [by] obtain[ing] infrastructure under a sharing arrangement at prices lower than it would achieve if it obtained infrastructure on a stand-alone basis, notwithstanding that the [incumbent LEC] may also realize some benefit from the arrangement"); GTE Opposition at 3-4 (qualifying carriers "fully benefit by gaining access to infrastructure at a reasonably negotiated cost that enables them to provide service to their customers at just and reasonable rates"); RTC Reply Comments at 3 (it does not "follow legally that maximizing the benefits for one party to an agreement equates to prohibiting any benefit to the other"); USTA Opposition and Comments at 4 (MCI ignores "the benefits the [qualifying carrier] achieves by avoiding having to make the uneconomical infrastructure investment it would otherwise need to make on its own").

[47] We note that our conclusion is supported by most commenters in the underlying proceeding and by all other parties who filed in this reconsideration proceeding. *See, e.g.*, RTC Reply Comments at 2; USTA Opposition at 2 ("neither the statutory language nor its accompanying legislative history remotely support MCI's argument").

[48] *Infrastructure Sharing Order*, 12 FCC Rcd at 5497-98, 5534, ¶¶ 55, 128. *See also* USTA Opposition and Comments at 3-4 (section 259 prohibits the competitive use of shared infrastructure against the incumbent LEC).

qualifying carriers the full benefits of infrastructure sharing arrangements. The Commission, thus, left to the parties in the negotiating process the task of identifying those benefits and deciding upon the terms of sharing, including appropriate price terms.[49] The Commission expressly considered whether pricing regulations should be superimposed on the negotiation process in light of size or other alleged disparities between incumbent LECs and qualifying carriers.[50] Our decision not to impose pricing regulations was amply supported by the record.[51] Finally, we see no reason to alter the Commission's finding in the *Infrastructure Sharing Order* that price alone is not determinative of the terms and conditions of infrastructure sharing.[52] Only after considering all these factors, none of which are discussed by MCI in its petition, did the Commission state its belief that negotiations could permit qualifying carriers to fully secure the benefits of section 259.[53]

19. Our decision not to assert pricing authority is coupled with a commitment to monitor marketplace developments and section 259 negotiations as they develop in fact. In light of our conclusion above -- not to alter our decision on pricing authority -- we need not address the specific arguments of those commenters that challenge the specific pricing standard advocated by MCI.[54]

IV. CONCLUSION

20. For the reasons stated above, we grant, in part, SWBT's petition for reconsideration and clarification by making clear that section 259 cannot be used to resell the incumbent LEC's service within the incumbent LEC's telephone exchange area. We also grant petitions for reconsideration from BellSouth, GTE, Octel, and SWBT concerning intellectual property rights by modifying our requirement that incumbent LECs be responsible for obtaining third-party owned licensing for the benefit of qualifying carriers. Finally, we deny a petition from MCI that

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[49] The Commission noted the availability of its declaratory ruling and complaint processes, both to parties and competitors, where parties are unable to reach agreement or where evidence suggests that section 259 arrangements are being used to establish barriers to competitive entry. *See Infrastructure Sharing Order*, 12 FCC Rcd at 5499, 5530-31, 5528, ¶¶ 59, 116, 121.

[50] *Id.*, 12 FCC Rcd at 5528, ¶¶ 115-116. *See also* BellSouth Opposition at 4.

[51] *See* BellSouth Opposition at 5 (citing *Infrastructure Sharing Order*, ¶ 113). For example, RTC argues that the Commission's decision to rely on negotiation is consistent with section 259(b)(5), which requires the Commission to establish conditions that promote cooperation between participants in an infrastructure sharing arrangement. *See* RTC Reply Comments at 3 ("The mutuality inherent in sharing is better served by negotiation, with regulatory intervention confined to failures in cooperative efforts to set terms and conditions agreeable to both parties.").

[52] *Infrastructure Sharing Order*, 12 FCC Rcd at 5528-29, ¶ 117 ("[A]vailability, timeliness, functionality, suitability, and other operational aspects are also relevant to whether or not the qualifying carrier fully benefits from the economies of scale and scope of the providing LEC.").

[53] *Id.*

[54] *See, e.g.*, BellSouth Opposition at 5; RTC Reply Comments at 4.

asks the Commission to exercise pricing authority to ensure that section 259 sharing agreements are priced based on forward-looking costs.

V. PROCEDURAL ISSUES

A. Final Paperwork Reduction Act Analysis

21. In the *Infrastructure Sharing Order*, we conducted a Final Paperwork Reduction Act Analysis, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13.[55] The changes we adopt in this Order do not affect that analysis.

VI. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201-205, 259, 303(r), 403 of the Communications Act of 1934, as amended by the 1996 Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 259, 303(r), 403, and pursuant to section 1.106 and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.429, the Order on Reconsideration is ADOPTED, effective 30 days after publication of a summary in the Federal Register.

23. IT IS FURTHER ORDERED that the petition for reconsideration filed by BellSouth Corporation IS GRANTED, as described herein.

24. IT IS FURTHER ORDERED that the petition for reconsideration filed by GTE Service Corporation IS GRANTED, as described herein.

25. IT IS FURTHER ORDERED that petition for reconsideration filed by MCI Communications Corporation IS DENIED.

26. IT IS FURTHER ORDERED that the petition for reconsideration filed by Octel Communications Corporation IS GRANTED, as described herein.

27. IT IS FURTHER ORDERED that the petition for reconsideration and clarification filed by SWBT Telephone Company IS GRANTED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas

Secretary

[55] *See* 5 C.F.R. §§ 1320.1 *et seq.*

APPENDIX A - LIST OF PETITIONERS AND COMMENTERS

Petitions:
BellSouth Corporation (BellSouth)
GTE Service Corporation (GTE)
MCI Communications Corporation (MCI)
Octel Communications Corporation (Octel)
Southwestern Bell Telephone Company (SWBT)

Oppositions to Petitions for Reconsideration:
BellSouth
GTE
Rural Telephone Coalition (RTC)[56]
United States Telephone Association (USTA)

Reply Comments:
BellSouth
GTE
Southwestern Bell (SWBT)

[56] RTC styled these comments as "Reply Comments," and, to prevent confusion, we will refer to RTC's pleading as Reply Comments.